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16 A.L.R. 1234 .....

14 Am. Jur. 175 .....

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7 Cal. Jur. 375 .....

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. 79

CHARLES AUGUSTUS DIXON,
Petitioner,

vs.

CLINTON T. DUFFY, Warden,
San Quentin Prison,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

OPINION BELOW.

Petitioner's application for a writ of habeas corpus was denied without opinion and without requiring the respondent to answer.

JURISDICTION.

The jurisdiction of this Court was invoked by petitioner under the terms of 28 U.S.C., Section 1257(3).

The federal questions sought to be reviewed were raised in the California Supreme Court in a collateral attack upon a final judgment of a *nisi prius* Court, no appeal having been taken from said judgment to the Appellate Courts of California.

We challenge the jurisdiction of this Court.

There is and can be no showing that the Supreme Court of California passed upon the federal question sought to be raised in the California Courts and now presented here.

In California a convicted defendant who has not appealed from a judgment of conviction is not entitled as a matter of right to attack a judgment collaterally on matters appearing in the record and which were available to him on appeal.

In California a writ of habeas corpus cannot be used as a substitute for an appeal.

This subject will be developed in the argument to follow.

QUESTIONS PRESENTED.

1. Does the Supreme Court of the United States have jurisdiction of this proceeding, it not appearing that the State Court passed upon a federal question

when it denied petitioner's application for a writ of habeas corpus?

And if the jurisdictional problem is surmounted:

2. Whether or not California has penal jurisdiction over the offense commonly referred to as counterfeiting.

3. Whether or not a ruling excluding evidence in a Federal Court is controlling in another cause pending in a State Court.

4. Whether or not California adequately recognizes the right of its citizens to be protected from unreasonable search and seizures.

STATEMENT OF THE CASE.

On October 21, 1950, Charles Augustus Dixon filed in the Supreme Court of the State of California an application for a writ of habeas corpus alleging in substance that as a result of an illegal search and seizure evidence was secured and a confession obtained which were used to convict him in a criminal action instituted against him in the Superior Court of the State of California in and for the City and County of San Francisco for the crime of making or passing counterfeit dies or plates (Sec. 480, Penal Code of Calif.).

On November 9, 1950 the California Supreme Court denied the petition for habeas corpus, two of the justices voting for the issuance of the writ.

A petition for a rehearing was not addressed to the California Court.

On January 13, 1951 certiorari was requested of this Court and on May 28, 1951 the request was granted.

Petitioner failed to prosecute an appeal to the state Appeliate Courts from the judgment which he later attacks collaterally by habeas corpus, the denial of which he now seeks to review (R. 1).

STATEMENT OF FACTS.

(Note: The facts hereinafter recited are gleaned from the petition for the writ of habeas corpus filed in the California Supreme Court which appears in the record here. Respondent denies the accuracy of petitioner's recitals and is prepared to submit to this Court a certified copy of the record of the evidence taken before the trial Court which record, however, has never been submitted to the California Supreme Court and consequently is not in the printed record before this Court.)

1. The facts disclosed by the petition for habeas corpus.

On November 19, 1948, two individuals who were later identified as police officers of the City and County of San Francisco and without petitioner's consent or a search warrant and over petitioner's strenuous objection proceeded to search his apart-

ment. Petitioner's objections were overcome by force, the use of handcuffs and a show of firearms (R. 2).

The officers had neither a warrant for petitioner's arrest nor did they have a search warrant (R. 2).

The police officers phoned to officers of the United States Secret Service who then joined the police officers.

The Secret Service Agents after conference with the police officers advised petitioner that he was under arrest (R. 3). Petitioner was asked to sign a waiver of his right to object to an illegal search and seizure and was advised if he did not do so the officers would leave and in a short time would procure a search warrant and petitioner's wife would be arrested and things "would then go harder" with him (R. 3).

Petitioner signed the proposed waiver and his apartment was searched (R. 3).

The Secret Service Agents accompanied by the police officers then took petitioner to the office of the Secret Service. He was again threatened that his wife would be prosecuted if he did not sign a confession and being in pain and suffering he did sign a confession and waive a preliminary hearing (R. 3) but that the confession was not his voluntary act (R. 11). The petitioner states that prior to giving his confession he was beaten by the police officers (R. 11).

Petitioner was later charged by an indictment filed in the United States District Court for the Northern

District of California with violations of the federal counterfeiting laws. Petitioner was represented by counsel who successfully moved to suppress the evidence obtained as a result of the search of the petitioner's apartment (R. 4) and the United States Attorney dismissed the indictment. The opinion of the judge suppressing the evidence is attached to and made a part of the petition for habeas corpus as an exhibit (R. 29-33).

Thereafter petitioner was taken into custody by San Francisco police officers and charged with a violation of the California laws denouncing counterfeiting. The evidence before the State grand jury consisted in part of the material ordered suppressed in the federal proceeding. An indictment was returned to the Superior Court of the State of California in and for the City and County of San Francisco accusing petitioner of the crime of felony, to wit, a violation of sec. 480 of the Penal Code of California (counterfeiting) (R. 4), and two prior felony convictions.

Again petitioner was represented by counsel who prior to trial moved to suppress the evidence which had been seized at his apartment, the motion was denied, and the evidence was used at the trial. Thereafter, on March 31, 1949, and after a trial before a jury, he was found guilty as charged and is now in prison pursuant to the judgment of the State Court (R. 4, 5).

Petitioner did not appeal and states that he did not know that he had but eleven days in which to perfect his appeal (R. 1).

On October 21, 1950, petitioner applied to the California Supreme Court for habeas corpus which was denied without opinion on November 9, 1950, which denial is now here on certiorari.

2. The facts as disclosed by the opinion order of the United States District Court suppressing the evidence.

The order of the United States District Court suppressing the evidence states facts which are in some respects different from those stated by the petitioner in his petition and that Court stated that in view of the fact that petitioner had been previously convicted of a felony he concluded that the version of the officers should prevail over that of petitioner (R. 31). For this reason we here narrate some of the facts gleaned from the order referred to.

On the morning in question the police officers rang the bell of petitioner's apartment. He opened the door and they went in. The officers identified themselves and stated that they wished to question the petitioner about a party by the name of Levitt. After questioning the defendant for several minutes one of the officers looked around the apartment. Petitioner demanded a search warrant. He was handcuffed and the search proceeded. Petitioner stated he was roughly treated and this was denied by the officers. The Court accepted the officers' version (R. 31).

Thereafter the federal officers were called, the search continued and petitioner and the evidence were turned over to the federal officers.

It may be well to note at this point that petitioner does not describe the property seized by the officers. However, if speculation is proper, we may surmise from the nature of the offense charged and the initial recital in the order of the District Court that the following items were seized, to wit, two film photographic negatives of a Federal Reserve note, three copper plates in the likeness of plates designed for the printing of Government obligations (R. 29), and photographic equipment (R. 4).

Not only was the evidence ordered suppressed by the Federal Court but the contraband material was ordered returned to petitioner.

3. The facts as shown at the trial in the State Court.

The evidence taken at the trial which resulted in the judgment here under attack is recorded in a 255-page transcript, an authenticated copy of which is available for the Court and petitioner if it will be of assistance to either.

SUMMARY OF THE ARGUMENT.

1. It not appearing that the State Court passed upon a federal question when it denied petitioner's application for a writ of habeas corpus, this Court cannot review the State Court's action by certiorari.

   (a) In California a collateral attack on the final judgment of a nisi prius Court by way of habeas corpus cannot be used as a substitute for an appeal.

   (b) The petition for the writ of habeas corpus was insufficient under California law.

2. Petitioner having failed to avail himself of his right to correct the alleged error committed by the California Court by the way of appeal can not use a habeas corpus proceeding as a writ of error.

3. A State as well as the Federal government may denounce the counterfeiting of Federal obligations.

4. A ruling by a Federal nisi prius Court excluding evidence is not controlling in another cause pending in a State Court.

5. Although California rejects the doctrine of the Week's case nevertheless the right of the citizen to be immune from unreasonable searches and seizures is recognized and adequately protected by the laws of the State.

ARGUMENT.

1. IT NOT APPEARING THAT THE STATE COURT PASSED UPON A FEDERAL QUESTION WHEN IT DENIED PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS, THIS COURT CANNOT REVIEW THE STATE COURT'S ACTION BY CERTIORARI.

(a) In California a collateral attack on the final judgment of a nisi prius Court by way of habeas corpus cannot be used as a substitute for an appeal.

The basic rule in California governing the issuance of a writ of habeas corpus is that the writ may not be used to correct error which might have been corrected on appeal (*In re Trombley*, 31 Cal. (2d) 801; *In re Lindley*, 29 Cal. (2d) 709; *In re Porterfield*, 28 Cal. (2d) 91; *In re Byrnes*, 26 Cal. (2d) 824).

In California as well as in the Federal Courts a discharge of a prisoner confined under a judgment of conviction, is granted only in the exercise of a sound judicial discretion. The remedy is an extraordinary one, out of the usual course, and involves a collateral attack on the process of judgment constituting the basis of the detention. The instances in which it is granted, when the law has provided another remedy in regular course, are exceptional, and usually confined to situations where there is peculiar and pressing need for it, or when the proceeding or judgment under which the prisoner is held is wholly void (*Goto v. Lane*, 265 U.S. 393, 68 L. Ed. 1070).

The California Courts follow the rule of the Federal Courts as announced in *Goto v. Lane*, supra, and held in *In re Bell*, 19 Cal. (2d) 488, that since the

granting of a writ of habeas corpus results in the release of the petitioner, while reversal on appeal may result merely in a new trial with the exclusion of those charges found based on unconstitutional enactments or the inclusion of that procedure found constitutionally guaranteed, the California Courts may in their discretion refuse to grant the writ if the remedy by appeal is not exhausted. In *Wade v. Mayo*, 334 U.S. 672, 92 L. Ed. 1647 this Court pointed out that in a case in which the failure of the State Court to specify the reason for the dismissal of a petition for habeas corpus made it possible to construe the action as a holding that a direct appeal from the conviction was the only remedy available and in such event no federal question was available for review by this Court.

The reasoning back of this rule is obvious and applicable here.

The record of the trial in the *nisi prius* Court would reveal the substantiality of petitioner's claim and on appeal the Appellate Court would be in a position to adequately appraise its merit.

Consider the possibilities in the instant case:

Suppose for the purposes of argument the *nisi prius* record should disclose: that the police officers had official information that a felony warrant was outstanding for the arrest of Levitt; that he resided with Dixon in the apartment in question; that the officers went to the apartment to apprehend Levitt; that they rang the bell to the apartment and Dixon

opened the door; that the officers thereupon entered and questioned Dixon about the whereabouts of Levitt; that Dixon advised them that although he and Levitt were friends and associates, nevertheless Levitt did not live in the apartment; that during this legitimate conversation one of the officers had a roving eye and observed in one of the rooms an arrangement of photographic equipment with a ten dollar Federal Reserve note before the camera; that he then questioned Dixon about the equipment whereupon Dixon demanded a search warrant; and, that then the officer arrested and handcuffed Dixon, seized the equipment, together with counterfeit plates and bills.

These facts are all possible and even probable in view of the facts stated in the habeas corpus petition and the facts stated in the order of the District Court.

If these facts appeared in a record on appeal the Appellate Court would have no difficulty in concluding that the presence of the officers in Dixon's apartment was proper, that by the use of their senses the officers had probable cause to believe that the offense of counterfeiting was taking place in their presence and that the consequent arrest was proper and the search was an incident thereof (*Penal Code of California*, sec. 836; *Orfield, Crim. Pro. Arrest to Appeal*, p. 14, et seq.; *Restatement Torts*, sec. 206; *American Law Institute, Code of Criminal Procedure*, sec. 21; *Brinegar v. U. S.*, 338 U.S. 160; 93 L. Ed. 1879).

We submit that a Court is not compelled to accept the oath of a thrice convicted felon as against the presumption of official duty properly performed, especially when the thrice convicted felon neglected to take the one step which would have placed the actual facts before the Court.

We are not unmindful of the fact that California Courts will in exceptional cases entertain a petition for habeas corpus which is in effect a collateral attack on a judgment of conviction. Petitioner has cited the following cases: *People v. Adamson*, 34 Cal. (2d) 320; *In re Wells*, 35 Cal. (2d) 889; *In re Bell*, 19 Cal. (2d) 488; *In re Byrnes*, 26 Cal. (2d) 824; *In re Seeley*, 29 Cal. (2d) 294 and *In re McVickers*, 29 Cal. (2d) 264. In each of these cases the California Court recognized that the particular case was an exception to the general rule and that its action was the exercise of a judicial discretion.

All that the *Adamson* case (34 Cal. (2d) 320) decided is that habeas corpus rather than *coram nobis* is the appropriate remedy to attack a judgment obtained in violation of fundamental constitutional rights, for instance, a judgment obtained by false testimony knowingly used. In the *Wells* case (35 Cal. (2d) 889) the attack was on the constitutionality of a statute and rulings on the evidence. This case (*Wells*) had already been fully considered on an appeal from the judgment (*Peo. v. Wells*, 33 Cal. (2d) 330) and the Court based its denial on matters appearing in record on that appeal. At best the

Wells case cited by counsel was an answer by the California Supreme Court to the decision of the United States District Court which had entertained a petition for a writ of habeas corpus. The *Bell* case (19 Cal. (2d) 488) has already been considered by us. It is only authority for the proposition that in exceptional cases the California Courts will entertain a collateral attack on a judgment by way of habeas corpus. The *Byrnes* case (26 Cal. (2d) 824) follows the general rule for which we are contending. The *McVickers* case (29 Cal. (2d) 264) and the *Seeley* case (29 Cal. (2d) 294) also follow the general rule that a collateral attack on a judgment by habeas corpus will not lie. In these cases the California Supreme Court entertained the petitions on the theory that the length of sentence was under attack rather than the judgments.

It is interesting to note that the exceptions to the general rule are generally cases in which the petitioner is relying on matters outside the record; cases involving perjured testimony; cases in which a plea was obtained by duress, etc. No case has been cited where the issue of lack of due process involved rulings on the admission of evidence where a full opportunity was given by the trial Court to explore the matter and the appellate process was available for the correction of error but was not used.

(b) The petition for the writ of habeas corpus was insufficient under California law.

The California Court may well have refused to entertain petitioner's application for habeas corpus because of the insufficiency of the petition as a pleading. That Court has gone to some pains to outline the rules which are to guide a petitioner (*In re Swain*, 34 Cal. (2d) 300). In the *Swain* case just referred to the petitioner was a convict without counsel. Although the petitioner here drew his own petition he did have counsel both in the federal and State Courts who adequately represented him.

Although petitioner described at great length the facts surrounding the search and seizure complained of he nowhere alleges that these matters were presented to the California trial Court. He alleges that "he did enter a motion, similar to the preceding action in the United States District Court" (R. 4) and that the evidence sought to be suppressed was the same as that suppressed by the Federal Court. But the showing before the Federal trial Court is not disclosed here nor was it disclosed to the California Court. Neither does the petitioner show what testimony was offered in the State Court in opposition to his motion. Perhaps he relied upon some theory of *res judicata*. But there is no showing that the local officials or the State were ever parties to the Federal proceeding.

The petition of habeas corpus was obviously defective when measured by the *Swain* case. This does not present a Federal question.

2. **PETITIONER HAVING FAILED TO AVAIL HIMSELF OF HIS RIGHT TO CORRECT THE ALLEGED ERROR COMMITTED BY THIS CALIFORNIA COURT BY THE WAY OF APPEAL CANNOT USE A HABEAS CORPUS PROCEEDING AS A WRIT OF ERROR.**

If petitioner's complaint has any merit at all, it is this: The California Court received in evidence matter which was obtained as a result of an illegal search and seizure.

If this was error, it should have been called to the attention of the California Court in the orderly manner provided by law, i.e., an appeal, and if the California Court persisted in its error and a Federal question was involved, the final judgment could have been reviewed by this Court on certiorari.

Petitioner did not use this orderly process.

If an order made under Rule 41(e) Federal Rules of Criminal Procedure is to have any effect on a State Court it must be as a rule of evidence. The erroneous admission of illegally obtained evidence in a criminal case must be urged on appeal and thereafter by petition for writ of certiorari and may not be urged on habeas corpus or other proceeding collaterally attacking the judgment, since the erroneous admission of such evidence does not divest the Court of jurisdiction. *Price v. Johnston* (1942), 125 Fed. (2d) 806 (cert. denied 316 U.S. 677, 86 L. Ed. 1750, 62 S. Ct. 1106); *Bozel v. Hudspeth* (1942), 126 Fed. (2d) 585.

3. A STATE AS WELL AS THE FEDERAL GOVERNMENT MAY DENOUNCE THE COUNTERFEITING OF FEDERAL OBLIGATIONS.

California forbids and punishes the several offenses generally found under the heading of counterfeiting (sec. 473, et seq. and 648 of the Penal Code of California) as does the Federal Government.

Sustaining the jurisdiction of a State to punish counterfeiting, see: 7 *Cal. Jur.* 375; 14 *Am. Jur.* 175.

The Federal and State jurisdictions are concurrent; the Federal Government may punish counterfeiting in the interest of protecting its currency, while the State may do so in the interest of protecting its citizens from fraud.

A note at 16 A.L.R. 1234 lists the authorities for the general proposition that concurrent criminal jurisdiction exists in many situations. In such situations acquittal in one jurisdiction does not preclude prosecution in the other.

People v. Grosofsky, 73 Cal. App. (2d) 15, 165 P. (2d) 157, is an analogous case, involving state prosecution for counterfeiting of gasoline coupons.

The following cases are all directly in point—they hold that there is concurrent jurisdiction over counterfeiting:

U. S. v. Arizona, 120 U.S. 479, 30 L.Ed. 728;
Fox v. Ohio, 46 U.S. (5 How.) 410, 12 L. Ed. 213;
People v. McDonnell, 80 Cal. 285, 22 Pac. 190;
People v. White, 34 Cal. 183.

4. **A RULING BY A FEDERAL NISI PRIUS COURT EXCLUDING EVIDENCE IS NOT CONTROLLING IN A STATE COURT.**

The Federal rule excluding illegally obtained evidence was first announced in *Weeks v. U. S.* (1914), 232 U.S. 383, 58 L. Ed. 652, 34 S. Ct. 341. Every application of the Weeks doctrine obviously involves determination of an issue which is only collateral to the question of the accused's guilt. Before the trial began, Weeks had petitioned the Court for suppression of the illegally obtained evidence. The Supreme Court approved this procedure, recognizing the injection of this collateral issue into trials would cause confusion and delay. The Supreme Court later expressly recommended use of a similar procedure for determination of the admissibility of evidence obtained by wire-tapping (*Nardone v. U. S.*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307). This suggestion has been adopted by the District Courts (*United States v. Lewis* (1950), 87 Fed. Supp. 970).

Sections 15 and 16 of Title XI of the Espionage Act of 1917 (40 Stats. 217, 18 U.S.C. Secs. 625, 626) gave legislative sanction to pre-trial determination, by either a judge or a United States Commissioner, of the legality of a seizure. The purpose of allowing the commissioner to entertain the motion was to enable the accused to prevent the commissioner from admitting the evidence in the preliminary hearing. *U. S. v. Napelo* (1928), 28 Fed. (2d) 898. His determination was not binding on the Court (*Hexter v. U. S.* (1929), 33 Fed. (2d) 402). The Commissioner was ousted of his jurisdiction to suppress evidence

once an indictment was filed (*U. S. v. McKay* (1924), 2 Fed. (2d) 257). All of the above indicates that the special proceeding was intended to implement a federal rule of evidence—*not to force that rule upon the State Courts.*

In providing that if the motion is granted the property "shall not be admissible at any hearing or trial", Rule 41(e) Federal Rules of Criminal Procedure does not specifically exempt State Courts. It is nevertheless clear that such an exemption was intended. From its origin, the procedure now set out in Rule 41(e) had one objective—to enable the doctrine of the *Weeks* case to be applied in the Federal Courts without interrupting the orderly conduct of criminal trials.

The true purpose and scope of the proceeding is indicated by the opinion in *Foley v. U. S.* (1933), 64 Fed. (2d) 1, 3:

> "Though no indictment be pending, the court may reach forward to control the improper preparation of evidence which is to be used in a case coming before it, and can always restrain oppressive or unlawful conduct of its own officers."

We have found no judicial language indicating that a Federal Court's order suppressing evidence binds any but the Federal Courts. In *Cogen v. U. S.* (1929), 278 U.S. 221, 73 L. Ed. 282, 49 S. Ct. 120, the Supreme Court held that when an order suppressing evidence is made after the indictment has been filed (as it was in Petitioner's case) it is not an independ-

ent proceeding. The order is interlocutory and therefore not appealable. See also *Coastwise Lumber and Supply Co. v. U. S.* (1919), 259 Fed. 847.

How could the State of California be bound by an interlocutory non-appealable order, made in a proceeding to which the State cannot be a party?

If petitioner's contention is valid, it would mean that any time illegally obtained evidence would support conviction of both a Federal and a State offense (even though the offenses be quite unrelated) the accused could force the State Court to adopt the Weeks doctrine by moving the Federal Court to suppress the evidence.

The Federal Rules were adopted under statutory authority expressly limited to the establishment of rules for Federal Courts and Commissioners. Petitioner's argument implies that these rules should have the startling effect of overruling *Wolf v. Colorado* and the important principle of intergovernmental relations for which it stands.

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5. **ALTHOUGH CALIFORNIA REJECTS THE DOCTRINE OF THE WEEKS CASE, NEVERTHELESS THE RIGHT OF THE CITIZEN TO BE IMMUNE FROM UNREASONABLE SEARCHES AND SEIZURES IS RECOGNIZED AND ADEQUATELY PROTECTED BY THE LAWS OF THE STATE.**

The 4th and 5th Amendments to the United States Constitution are the law of the land. California accepts these amendments as binding and acknowledges

that its citizens are entitled to have these guarantees adequately protected by the laws of California.

In securing these guarantees to citizens the Federal government has since 1914 by virtue of the *Weeks* case, 232 U.S. 383, 58 L. Ed. 652, secured these rights to citizens by forbidding the introduction into evidence in Federal Courts of material obtained as a result of an illegal search and seizure.

California has consistently refused to follow the *Weeks* case.

From *People v. Mayen,* 188 Cal. 237 to *People v. Gonzales,* 20 Cal. (2d) 166, and now *People v. Rochin,* 101 Cal. App. (2d) 140 (cert. granted) the California Courts have admitted in evidence material obtained as a result of illegal search.

Not only have the California Courts rejected the *Weeks* doctrine but the California Legislature has joined in that rejection. Mr. Justice Carter in his dissenting opinion in the *Rochin* case (101 Cal. App. (2d), at page 144) emphatically announced: "I am asking the Legislature of California to enact legislation which force the courts of this state to uphold the constitutional provisions (U. S. Const. 4th Amendment, California Constitution, Art. I, sec. 19) guaranteeing the right of privacy to residents of this state."

Mr. Justice Carter asked and the Legislature rejected the request.

Three bills[1] were introduced in the 1951 Legislature which would have in effect made the rule in the *Weeks* case the rule in California. None of the bills were enacted into law.

This Court in *Wolf v. Colorado*, 338 U.S. 25, 93 L. Ed. 1783, after a full review of the entire subject held that although the guarantees of the 4th and 5th Amendments were binding on the states the failure on the part of a state to implement these amendments by the adoption of the rule in the *Weeks* case did not constitute a deprivation of due process.

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[1] *Senate Bill 1689.*

"An act to add Section 1873 to the Code of Civil Procedure, relating to evidence.

The People of the State of California do enact as follows:

Section 1. Section 1873 is added to the Code of Civil Procedure to read:

1873. No evidence obtained in violation of Section 19, of Article I of the Constitution or any law of this State shall ever be introduced or admitted or used for any purpose whatsoever in any court of this State."

Assembly Bill 3120.

"An act to add Section 1102.5 to the Penal Code, relating to evidence.

The People of the State of California do enact as follows:

Section 1. Section 1102.5 is added to the Penal Code, to read:

1102.5. No evidence obtained in violation of Section 19 of Article I of the Constitution or any law of the State of California shall ever be introduced or admitted or used for any purpose whatsoever in any court of this state."

Assembly Bill 1493.

"An act to add Section 1045 to the Penal Code, relating to evidence in criminal proceedings.

The People of the State of California do enact as follows:

Section 1. Section 1045 is added to the Penal Code, to read:

1045. No evidence shall be admitted against the defendant in any criminal proceeding which has been obtained in a manner prohibited by law."

The reason underlying the difference between the Federal rule as expressed in the *Weeks* case and the State rule as allowed in the *Wolf* case finds its basis in history.

The early common law did not recognize search warrants, but they crept into the law, as it is said, by "imperceptible degrees" for the purpose of searching for stolen goods. With the growth of the inquisitorial procedure of the Star Chamber there grew up, however, a practice of allowing the secretary of state to issue general warrants for the search of libels. The power was expressly conferred by the licensing acts, but it survived their expiration. The issue of searches and seizures came to a head in the 1760's when John Wilkes and certain others were arrested for seditious libel. Out of these proceedings two important rules of law emerged. The first concerned the validity of general warrants; the second the validity of special warrants to search for and seize private papers.

The warrant under which Wilkes was arrested was issued by Lord Halifax, principal secretary of state under George III, ordering all "His Majesty's officers, civil and military, and loving subjects whom it may concern" to "make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper" and to bring them in "together with their papers" for examination. A search warrant could scarcely have been phrased in more inclusive terms. The question of its validity

was not passed upon in the Wilkes habeas corpus proceeding which followed, nor was it clearly determined, although it was discussed both by counsel and the justices, in the damage suit of Dryden Leach against three of the king's messengers. Shortly after these cases, however, the House of Commons by resolution declared all general warrants to be illegal "except in cases provided by act of Parliament."

James Otis' thundering condemnation in Boston in 1761 of the odious writs of assistance, "instruments of slavery on the one hand and villainy on the other," preceded by two years the arrest of Wilkes. The controversy over searches and seizures was therefore under way in the colonies before it came to a head in England. But writs of assistance for the apprehension of smugglers and the seizure of customable goods were expressly authorized by act of Parliament, whereas the warrants involved in the English cases were sanctioned neither by the common law nor by statute.

The issue over writs of assistance was one of the flames that lighted the American Revolution. When therefore the state conventions that ratified the Federal Constitution in 1787-88 clamored for amendments that would safeguard individual liberties against the government, it was natural that protection against unreasonable searches and seizures should have been thought of. Hence the Fourth Amendment, which among others was proposed by the First Congress in 1789 and ratified by the states two years later: "The

right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." Closely related to this declaration both in point of fact and in judicial interpretation is the provision against self-incrimination (q.v.) in the Fifth Amendment.

"Unreasonable searches and seizures" is manifestly an elastic phrase, subject to no precise definition and therefore to considerable latitude in interpretation. The result is that American law upon this subject offers considerable diversity and tendency to vagary. Even where searches and seizures are admittedly illegal the problem of the best means of giving effect to the constitutional guaranty presents itself. The Federal Courts as well as the Courts of more than a third of the states have held the view that the only sufficient means by which the protection can be truly realized is by a refusal on the part of the Courts to receive at trial evidence that has been acquired by the government as a result of an unreasonable search and seizure. This they hold is the only safeguard that will restrain overzealous government enforcing officers.

A majority of the State Courts, however, take a different view. They hold that evidence of crime is evidence no matter how it has been secured and that

the culprit should not go free because his constitutional rights have been abused. As it has been put by Justice Cardozo, the criminal should not go free "because the constable has blundered" [*People v. Defore*, 242 N.Y. 13 (1926)]. The Courts point out that the aggrieved citizen has other remedies against the offending officer. He may, for example, resist the officer who illegally invades his privacy or he may sue him for damages or prosecute him for oppression or ask that he be removed or otherwise disciplined by his superiors.

As was pointed out in the *Wolf* case, the remedies by which the arbitrary conduct of the officers should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

The rule of decision in California is the common law of England as it stood in the year 1850 (*Martin v. Superior Court*, 176 Cal. 289). At common law the remedy against an unlawful search and seizure was an action of trespass. In England from the time of *Leach, Entick and Wilkes* (1763) (19 How. State Trials, 1002, and 1030, 1154) to *Ellias v. Pasmore* (K.B. 1934, Vol. 2) this was considered sufficient. In 1763 Wilkes recovered from the King's Messenger 1000 pounds—no mean sum then or now. In the *Ellias* case, Sir Stafford Cripps, K.C., recovered 40 pounds

and costs on behalf of the members of the National Unemployed Workers.

In California, following the common law tradition, the citizen has secured to him the same protection for his right to immunity from unlawful searches and seizures. This remedy is not only theoretical—it is an actuality. In *People v. Rochin,* 101 Cal. App. (2d). 140, at page 143, the Court said: "A remedy of defendant for such highhanded, reprehensible conduct is an action for damages." In *Stern v. Superior Court,* 76 Cal. App. (2d) 772, the California District Court of Appeal ordered the trial Court to return to Stern the sum of $6000 taken from him as the result of an illegal search and seizure. *Silva v. Macauley,* 135 Cal. App. 249, is authority for the proposition that an officer who acts in excess of his authority is liable to answer in damages and affirmed an award of $428 on account of the illegal seizure of crabs. Such liability extends not only to the officer immediately involved but to his principal and his bondsmen as well (*Abbott v. Cooper,* 218 Cal. 425).

What was said in the *Wolf* case about the securing of the guarantees of the 4th and 5th Amendments and "due process" was earlier stated by this Court in *Herbert v. Louisiana* (1926), 272 U.S. 312:

> "What it [due process] does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and

now infrequently are designated as 'law of the land.'"

The difference between the remedy in the *Weeks* case and the remedy as provided by California and a majority of the states finds a basis in reason and history.

Wilkes and *Leach* and *Entick* had no quarrel with the local peace officer. They were victims of a political persecution carried on by the central government.

Otis and the founding fathers thundered against the officers of the crown and not against the colonial officers.

The 4th and 5th Amendments were aimed at the correction of abuses of authority by a strong central government fresh in the memory of those who participated in the activities of the bodies which ratified the new Constitution and demanded the amendments.

The "patrolman on the beat" will never be part of a "gestapo". The *Wolf* case recognizes this fact and points out that the local police are more amenable to local control and less likely to be the adjuncts of political and religious persecutions.

As Mr. Justice Jackson said in his dissenting opinion in *Brinegar v. United States*, 338 U.S. 160, 181, 93 L. Ed. 1879, 1893:

"This inconsistency does not disturb me, for local excesses or invasions of liberty are more amenable to political correction, the Amendment

was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source."

Another point remains to be considered.

The objects introduced in evidence were photographic equipment used in counterfeiting, copper plate used in making counterfeit bills, and counterfeit bills. These were the instrumentalities and means by which a crime is committed. These objects were contraband and the property of the United States Government (28 U.S.C., Sec. 492). The order of the United States District Court was void on its face. How could a Court order the instruments and fruits of the crime of counterfeiting to be returned to the criminal? And now the criminal asks this Court to protect him in its possession. The next step will be a request to have a marshal of this Court accompany petitioner while he tries to dispose of the counterfeit bills to prevent the local police from interfering with his possession of the contraband.

The seizure in this case by the police was legal and within the following language of *Harris v. United States*, 331 U.S. 144, 154, 91 L. Ed. 1399, 1407:

"Furthermore, the objects sought for and those actually discovered were properly subject to seizure. This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant

or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime. Clearly the checks and other means and instrumentalities of the crimes charged in the warrants toward which the search was directed as well as the draft cards which were in fact seized fall within that class of objects properly subject to seizure. Certainly this is not a case of search for or seizure of an individual's private papers, nor does it involve a prosecution based upon the expression of political or religious views in such papers."

CONCLUSION.

We submit that California by tradition and practice affords its citizens the protection of the 4th and 5th Amendments to the United States Constitution.

It has deliberately adopted the logic of Cardozo.

While protecting its citizens it has not granted immunity to the criminal.

What was good enough for Wilkes, Leach and Entick and that host of others, the victims of political and religious persecutions, should be good enough for the counterfeiter, the narcotic peddler and all

of the gentry that have occupied the witness chairs of legislative committees and crime commissions.

Dixon asks that the handcuffs be removed from him and that the police be shackled instead.

We are confident that this will not be done.

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Respectfully submitted,

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